Supreme Court, U.S.
FILED
OCT 4 - 2004
OFFICE OF THE CLERK

No. 02-1028

IN THE
Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

JAMES N. KIRBY LIMITED D/B/A KIRBY ENGINEERING AND ALLIANZ AUSTRALIA LIMITED,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENTS

DAVID C. FREDERICK
KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

MICHAEL F. STURLEY
Counsel of Record
727 East Dean Keeton St.
Austin, Texas 78705
(512) 232-1350

J. S. SCOTT BUSBY
CHARLES ROBERT SHARP
BOVIS, KYLE & BURCH, LLC
53 Perimeter Center East
Third Floor
Atlanta, Georgia 30346
(770) 391-9100

Counsel for Respondents

October 4, 2004

QUESTION PRESENTED

Pursuant to the Court's September 24, 2004 order requesting supplemental briefing, the parties have been asked to address the following additional question:

Does federal or state substantive law govern the questions presented?

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SUPPLEMENTAL BRIEF FOR RESPONDENTS

At the heart of this case is a state-law tort suit. The portion of the case before the Court – NS's asserted contractual defense – presents questions of Australian law about the proper interpretation of the ICC bill of lading. Because the accident occurred on land, not at sea, there is no basis to apply general maritime law or COGSA to interpret the relevant provisions of the bill of lading. And there is no justification to apply federal common law or any other federal statute.

The parties did not stress the choice-of-law issue below because both questions are governed by contract interpretation principles (*see* Opp. i, 1; Resp. Cert. Supp. Br. 1 n.1, 10) that are generally applicable throughout the common-law world. First, whether ICC acted as Kirby's agent to conclude a second contract of carriage with Hamburg Süd depends primarily on the intent of ICC and Kirby as expressed in their contract, which is evidenced by the ICC bill of lading.[1] Second, whether NS is a third-party beneficiary under the ICC bill's Himalaya clause also depends primarily on the intent expressed in that same contract.[2] Because the court of appeals was obliged

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[1] In the court below, Kirby argued the first question as a matter of contract interpretation, relying on the terms of the ICC bill of lading and on secondary sources to show the parties' intent. *See* Kirby CA11 Br. 16-24. "Norfolk Southern's main argument to the contrary," Pet. App. 10a n.9, was based on the Shipping Act. Recognizing that ICC was *either* a principal (carrier) *or* an agent, NS argued that it was an agent because it did not qualify as a "carrier" under the Shipping Act. *See* NS CA11 Br. 25-29. NS has "now abandoned" that argument, NS Cert. Supp. Br. 9 n.4; *see also* NS Cert. Reply Br. 5-6 n.4 ("not renewed here"). NS did not advocate the simultaneous-carrier-and-agent theory based on maritime law (or perhaps federal common law) that it now asserts.

[2] The parties and their amici argue the second question as a matter of contract interpretation. In the petition, NS asserted that question 2 raised an issue of "federal maritime law." Pet. i. Once certiorari was granted, however, NS abandoned that assertion and returned to the contract interpretation argument. *See* NS Br. i; Resp. Br. 37 n.36.

to resolve those questions of contract interpretation regardless of what law applied – state, federal, or foreign – and Kirby properly prevails under any of those sources of law, there was no "colorable reason even to consider foreign law" in the courts below, as NS concedes. NS Cert. Supp. Br. 4.[3]

I. Alabama and Australian law properly govern the questions presented

In this diversity suit filed in Georgia, federal courts must follow Georgia's choice-of-law rule. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). Georgia follows the traditional *lex loci delicti* rule, meaning the underlying tort claim is governed by the substantive law of the place where the tort occurred.[4] *See, e.g., Georgia Farm Bureau Mut. Ins. Co. v. Williams*, 266 Ga. App. 540, 541

Kirby has relied heavily on *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297 (1959), and its progeny for principles of contract interpretation. These principles are similarly expressed in decisions throughout the common-law world. *Cf.* Resp. Br. 35 n.32, 39 (citing *The Starsin*, [2003] UKHL 12). Indeed, the *Herd* Court itself discussed English and Australian cases, relying particularly on *Wilson v. Darling Island Stevedoring & Lighterage Co.*, 95 C.L.R. 43 (Austl. 1956), to preserve the uniformity of approach in these matters. *See* 359 U.S. at 306-08. Because both the *Herd* contract (a port-to-port bill of lading) and the incident (dropping cargo into Baltimore harbor) were within the admiralty jurisdiction, the Court applied general maritime law as the substantive rule of decision. *Cf.* pp. 4-5, *infra*.

[3] Respondents informed the Court at the certiorari stage that Australian law properly governs the central issues of contract interpretation. *See* Resp. Cert. Supp. Br. 1 & n.1, 10; *see also* Opp. 30 ("question necessarily involves an analysis of the Australian contracting parties' intent – not an issue of federal law"). In *Green Fire & Marine Insurance Co. v. M/V Hyundai Liberty* (No. 02-813), which came to conference on the same day as this case, the petitioner there also stressed the applicability of Australian law here, *see Green Fire* Pet. Supp. Br. at 3 (Dec. 10, 2003), and the absence of any federal law, *see id.* at 3-7.

[4] The Georgia Supreme Court recognizes a "public policy exception to the rule of *lex loci delicti*," under which state substantive law would override foreign law if necessary to protect state policy. *Alexander v. General Motors Corp.*, 267 Ga. 339, 340, 478 S.E.2d 123, 123-24 (1996).

n.4, 597 S.E.2d 430, 431 n.4 (2004). The train derailment underlying Kirby's tort claim occurred in Alabama. Thus, Alabama's substantive law governs that claim.

Both questions presented arise out of NS's asserted defense based on its claim to be a third-party beneficiary of contracts concluded in Australia.[5] Both Georgia and Alabama follow the traditional *lex loci contractus* rule, meaning that the law of the place in which the contract was concluded governs the interpretation of a contract. *See, e.g., Stovall v. Universal Constr. Co.*, Nos. 1021938 & 1021953, 2004 WL 1233970, at *9 (Ala. June 9, 2004); *Convergys Corp. v. Keener*, 276 Ga. 808, 582 S.E.2d 84 (2003). Thus, Australian law governs the contract interpretation issues.

Once the contract is properly interpreted under Australian law, state substantive law ultimately determines the extent to which the defense is recognized. *Cf.* n.4, *supra*. Under no tenable theory is NS's contract-based defense governed by federal substantive law.

II. The general maritime law does not apply in this case

NS has asserted that maritime law applies. *See, e.g.*, Pet. i, 1, 2, 5; NS Cert. Reply Br. 1-2. But maritime law cannot provide the substantive rule of decision here because there is no basis for admiralty jurisdiction.

As this Court explained in *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 204 (1971), "[w]hether federal maritime law govern[s] [an] accident . . . depends on whether [the case is] within the admiralty and maritime jurisdiction conferred on the district courts by the Constitution and the jurisdictional statutes." The Court there held that "federal

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[5] The ICC bill of lading is the only contract requiring interpretation under the questions presented. Question 1 addresses whether the Hamburg Süd bill of lading binds Kirby, but the actual interpretation of that bill is not a question presented to this Court. In any event, the Hamburg Süd bill of lading was also concluded in Australia.

maritime law does not govern this accident" because there was no admiralty jurisdiction. *Id.*[6]

That rule is constitutionally mandated. Without admiralty jurisdiction, there is no "congressional authorization [for the federal courts] to formulate substantive rules of decision." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981). Admiralty jurisdiction, in turn, exists either when a case is properly filed "in admiralty" (*i.e.*, the plaintiff asserts jurisdiction under 28 U.S.C. § 1333) or when the case could have been filed in admiralty (*i.e.*, the plaintiff could have asserted jurisdiction under § 1333 but chose instead to sue in state court or in federal court under 28 U.S.C. § 1331 or § 1332). Because Kirby brought its action in diversity and could not have sued in admiralty, there is no admiralty jurisdiction here.

There is no basis for admiralty tort jurisdiction because the "location" of the tort was not on "navigable waters" and NS's activities giving rise to tort liability did not have a "substantial relationship" to "traditional maritime activity." *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 533-34 (1995) (internal quotation marks omitted); *Sisson v. Ruby*, 497 U.S. 358, 363-64 (1990); *see also Victory Carriers*, 404 U.S. at 203-04 (holding that there is no admiralty jurisdiction over an accident on a pier because it did not occur on navigable waters). The Admiralty Extension Act, 46 U.S.C. app. § 740, which broadens the locality test, is irrelevant because the train derailment was not "caused by a vessel on navigable water." *Cf. Victory Carriers*, 404 U.S. at 209-10.

Nor does the ICC bill of lading fall within admiralty contract jurisdiction. The ICC bill evidences a "mixed contract" containing maritime and non-maritime elements. Admiralty contract jurisdiction "is limited to contracts, claims, and services *purely maritime*." *Rea v. The Eclipse*, 135 U.S. 599, 608 (1890) (emphasis added). A "mixed contract" is not within the admiralty jurisdiction because it is not "wholly maritime." *See* Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* § 1-10, at 28 & n.95 (2d ed. 1975); Steven F. Friedell, 1 *Benedict on Admiralty* § 183 (7th rev. ed. 2003).

The lower courts uniformly enforce the mixed contract doctrine to deny admiralty jurisdiction over multimodal through bills of lading.[7] Although they have recognized an exception to the rule when the maritime and non-maritime elements of a mixed contract are separable, *see* cases cited n.7, the exception would not help NS (even if the elements were separable) because the non-maritime element of the contract is at issue here. Nor would admiralty jurisdiction exist on the theory that the non-maritime element of the contract is merely "incidental" to the maritime element. *See* cases cited n.7. Here, the inland transportation was not merely incidental, but – as NS repeatedly asserts with its emphasis on "through" carriage – a significant and fundamental part of the contract.

III. No federal maritime statute applies

NS has striven mightily to convey the impression that this case involves COGSA. The Act is mentioned on virtually every page of the petition. NS's merits brief declares

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[6] *See also, e.g., Kossick v. United Fruit Co.*, 365 U.S. 731, 735-38 (1961) (concluding, as a prerequisite to applying general maritime law, that the claim raised in a diversity case was within admiralty contract jurisdiction); *Hartford Fire Ins. Co. v. Orient Overseas Containers Lines (UK) Ltd.*, 230 F.3d 549, 556 (CA2 2000) ("In the absence of admiralty jurisdiction, this [multimodal carriage] case is governed, under diversity jurisdiction, by applicable state choice-of-law rules.").

[7] *See, e.g., Hartford Fire Ins.*, 230 F.3d at 555-56 (no admiralty jurisdiction in a multimodal carriage case involving truck, rail, and sea carriage because the contract was not "'purely' or 'wholly' maritime in nature"); *Transatlantic Marine Claims Agency, Inc. v. Ace Shipping Corp.*, 109 F.3d 105, 109 (CA2 1997) (rail and sea); *Berkshire Fashions, Inc. v. M.V. Hakusan II*, 954 F.2d 874, 880-81 (CA3 1992) (sea and rail); *Kuehne & Nagel (Ag & Co) v. Geosource, Inc.*, 874 F.2d 283, 290 (CA5 1989) (sea and truck); *JVC Americas Corp. v. CSX Intermodal Inc.*, 292 F. Supp. 2d 586, 591 (D.N.J. 2003) (sea and rail); *Coleman Co. v. Compagnie Generale Maritime*, 903 F. Supp. 45, 48 (S.D. Ga. 1995) (rail and sea).

that "it is by force of COGSA that federal law provides the rule of decision in determining liability under carrier bills of lading." NS Br. 7. In truth, this case does not implicate COGSA in any way.[8]

Even NS admits that COGSA does not apply of its own force. *See* NS Br. 9. By its terms, COGSA applies only during the so-called "tackle-to-tackle" period. *See* COGSA § 1(e), 46 U.S.C. app. § 1301(e) (limiting coverage to "the period from the time when the goods are loaded on to the time when they are discharged from the ship"). COGSA thus applies only during the ocean voyage, not during any inland carriage. Indeed, COGSA explicitly disclaims any preemption of state law after the goods are discharged:

> Nothing in this Act shall be construed as superseding any part of [the Harter Act, 46 U.S.C. app. §§ 190-196], *or of any other law which would be applicable in the absence of this Act*, insofar as they relate to the duties, responsibilities, and liabilities of the ship or carrier prior to the time when the goods are loaded on or after the time they are discharged from the ship.

Id. § 12, 46 U.S.C. app. § 1311 (emphasis added). To the extent that state or foreign law applies to inland carriage in the absence of COGSA, therefore, it continues to apply notwithstanding COGSA.

Although bills of lading often extend COGSA to govern periods before loading and after discharge,[9] this contractual extension is effective only as a matter of contract. *See, e.g., Indemnity Ins. Co. of N. Am. v. Hanjin Shipping Co.*, 348 F.3d 628, 635 (CA7 2003); *Colgate Palmolive Co. v. S/S Dart Canada*, 724 F.2d 313, 315 (CA2 1983). COGSA has no power to preempt state law except to the extent that it applies as a federal statute. The parties may not avoid the application of controlling state law simply by incorporating the terms of a federal statute into their private agreement.[10]

In any event, the ICC bill of lading does not even attempt to extend COGSA to govern inland transportation. Clause 7.3 calls for the application of COGSA *only* when

[8] The district court held various state-law claims preempted by COGSA. Pet. App. 37a. That holding is erroneous, but respondents did not challenge it on interlocutory appeal because the separate limitation of liability issue raised "a controlling question of law" the resolution of which would "materially advance the ultimate termination of the litigation," 28 U.S.C. § 1292(b). Even if COGSA were applicable, NS would still have no basis to assert any limitation because it is not the beneficiary of a Himalaya clause that is binding on Kirby.

[9] NS's reliance on COGSA § 7, 46 U.S.C. app. § 1307, *see, e.g.*, NS Reply Br. 5, is misplaced. Section 7 provides that "[n]othing contained in this Act shall *prevent* a carrier or a shipper from entering into any agreement" regarding liability prior to loading or after discharge. 46 U.S.C. app. § 1307 (emphasis added). Section 7 thus is a savings clause that ensures that COGSA does not govern contractual dealings that apply outside the tackle-to-tackle period. *See* 1 *The Legislative History of the Carriage of Goods by Sea Act and the Travaux Préparatoires of the Hague Rules* 312 (M. Sturley ed. 1990). It would be ironic indeed if a savings provision designed to exclude the statute were construed to expand the preemptive reach of federal law.

[10] The Fourth Circuit has declared "that contractual incorporations of COGSA into foreign bills of lading should be construed according to federal law." *Wemhoener Pressen v. Ceres Marine Terminals, Inc.*, 5 F.3d 734, 740 (CA4 1993). This statement, however, was limited to the period when "the bill of lading is still governed by COGSA or the Harter Act." *Id.* In other words, the court declared that federal law supplies the rule of decision only when a federal statute (COGSA or the Harter Act) already governs. (This limitation is confirmed by the fact that all five of the decisions on which the court relied, *see id.* at 740-41, were also cases in which the Harter Act governed at the relevant time.) Moreover, the court justified its conclusion by noting the existence of admiralty jurisdiction. *Id.* at 740. Neither admiralty jurisdiction (*see* pp. 4-5, *supra*) nor the application of COGSA (*see* pp. 5-6, *supra*) or the Harter Act (*see* p.8, *infra*) is present in this case. In any event, *Wemhoener Pressen* is irrelevant here because the ICC bill of lading does not purport to extend COGSA inland. *See* pp. 7-8, *infra*.

In the absence of admiralty jurisdiction or the mandatory application of COGSA or the Harter Act, state law does apply. The lower courts have consistently recognized this, from Judge Friendly's seminal opinion for the Second Circuit in *Leather's Best, Inc. v. S.S. Mormaclynx*, 451 F.2d 800, 807-08 (CA2 1971), to Judge Wood's opinion for the Seventh Circuit last year in *Indemnity Insurance*, 348 F.3d at 633.

the statute is "compulsorily applicable to this FBL or would be applicable but for the goods being carried on deck in accordance with a statement on this FBL." JA 91. COGSA was not "compulsorily applicable" during inland carriage that took place after "the time when the goods . . . [we]re discharged from the ship." COGSA § 1(e), 46 U.S.C. app. § 1301(e). The fact that clause 7.3 deals specifically with deck carriage (otherwise excluded under COGSA § 1(c), 46 U.S.C. app. § 1301(c)), but makes no effort to alter the tackle-to-tackle limitation, is highly significant. The inference is unmistakable: The parties wanted COGSA to cover deck carriage but not inland carriage.

COGSA does not apply in this case for one more reason. The Act was passed to regulate the relationship between a carrier (ICC in this case) and a shipper (Kirby). It does not regulate a shipper's claim against a third party (such as NS). Just as the *Herd* Court found the Act irrelevant to the shipper's claim against the stevedore because it was not a COGSA carrier, so too COGSA is irrelevant to Kirby's claim against NS. Third parties outside of the § 1(a) "carrier" definition may be contractually protected by clear Himalaya clauses in appropriate circumstances, but they are never covered by COGSA itself.

NS has not claimed that the Harter Act provides the substantive law here, but that statute also does not extend to inland carriage. *See, e.g., Mannesman Demag Corp. v. M/V Concert Express*, 225 F.3d 587, 593-95 (CA5 2000); *Sony Computer Entm't Inc. v. Nippon Express U.S.A. (Illinios), Inc.*, 313 F. Supp. 2d 333, 337 (S.D.N.Y. 2004). The plain language of the statute, which governs "vessels" and related entities (rather than "carriers"), confirms this uniform jurisprudence. *See* Harter Act §§ 1-4, 46 U.S.C. app. §§ 190-193.

IV. No other federal law applies

No other federal statute or principle of federal "common law" governs the questions presented. The one federal

statute that might plausibly apply is the Carmack Amendment. *See* U.S. Cert. Br. 11-12. But NS concedes that "there is no Carmack issue in this case," NS Cert. Supp. Br. 2, and no provision of the Carmack Amendment addresses a railroad's purported defenses arising under a multimodal bill of lading to which it is not a party. The Federal Bill of Lading ("Pomerene") Act, 49 U.S.C. §§ 80101-80116, does not govern bills of lading for transportation *from* a foreign country *to* a place in a State. *Cf. id.* § 80102(5) (covering bills of lading for transportation "*from* a place in a State *to* a place in a foreign country") (emphases added).[11] Nor does the Shipping Act govern, as NS has conceded. *See* NS Cert. Supp. Br. 9 n.4 (Court can decide case "without any resort to analysis of the Shipping Act (which is not directly at issue)").

Finally, federal common law does not apply. Our merits brief (at 24-26) explains why federal common law does not support NS's novel defense of "carrier-agency."[12] Even NS

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[11] The Pomerene Act's coverage of outbound but not inbound bills of lading reflects Congress's acceptance of the international understanding that bills of lading should generally be governed by the law of the place of shipment. NS's past reliance (NS Cert. Supp. Br. 5) on *Cincinnati, New Orleans, & Texas Pacific Railway v. Rankin*, 241 U.S. 319 (1916), is misplaced. That pre-*Erie* decision assumed the existence of "common-law rules" to fill in the interstices of "acts of Congress" such as the Pomerene Act that expressly govern interstate bills of lading. *Id.* at 326-27. *Rankin* did not address an inbound international shipment that would fall outside the scope of the Pomerene Act, so its references to "federal common law" – especially pre-*Erie* – are irrelevant here.

[12] In any event, the cases on which NS relies for its assertion of a rule of carrier-agency did not rest on federal common law. In *New Jersey Steam Navigation Co. v. Merchant's Bank of Boston*, 47 U.S. (6 How.) 344 (1848), the Court's decision rested on maritime law. *See id.* at 391-92. *Great Northern Railway v. O'Connor*, 232 U.S. 508 (1914), involved enforcement of a federally imposed and filed tariff – a *statutory* obligation – and not a "federal common law" principle. *Id.* at 515 ("so long as the tariff rate, based on value, remained operative, it was binding upon the shipper"). And *Chicago, Milwaukee, St. Paul & Pacific Railroad v. Acme Fast Freight, Inc.*, 336 U.S. 465, 489 (1949), involved a construction of the Freight Forwarder Act of 1942.

does not claim a federal common-law basis for its Himalaya clause assertions. Such a claim would also fail for essentially the same reasons.

Since *Erie Railroad v. Tompkins*, 304 U.S. 64, 78 (1938), it has been well-recognized that, in the absence of "some congressional authorization to formulate substantive rules of decision," federal common law exists "only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases." *Texas Indus.*, 451 U.S. at 641 (footnotes omitted). NS's apparent view that federal common law applies is particularly implausible given the deregulation of the rail and ocean carriage industries, *see* Resp. Br. 26 n.24, and the express omission by Congress of statutory rules for bills of lading that govern shipments originating in foreign countries, *see* 49 U.S.C. § 80102. NS's assertion of a defense arising out of contract terms in both the ICC and Hamburg Süd bills of lading is thus precisely the type of "privately ordered obligation[]" this Court has held should be construed under state substantive law and not be deemed a "requirement" imposed by federal law. *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 228-29, 232 (1995) ("[a] remedy confined to a contract's terms simply holds parties to their agreements" and does not give rise to "federal common law"); *see* Resp. Br. 26. Given Congress's decision *not* to regulate foreign-issued bills of lading, it would be anomalous to impose federal common-law rules that purport to regulate the conduct of foreign parties.

Conclusion

Federal diversity jurisdiction gives this Court the power to decide this case. The substantive rule of decision, however, rests on state law, as informed by Australian contract interpretation principles. The Court should affirm or dismiss the writ as improvidently granted.

Respectfully submitted,

DAVID C. FREDERICK
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

MICHAEL F. STURLEY
Counsel of Record
727 East Dean Keeton St.
Austin, Texas 78705
(512) 232-1350

J. S. SCOTT BUSBY
CHARLES ROBERT SHARP
BOVIS, KYLE & BURCH, LLC
53 Perimeter Center East
Third Floor
Atlanta, Georgia 30346
(770) 391-9100

Counsel for Respondents

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